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No. 00-1768

Supreme Court, U.S.
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In The

Supreme Court of the United States

SUSAN LUDWIG,

Petitioner,

v.

NORTHWEST AIRLINES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

REPLY TO NORTHWEST AIRLINE'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JIM WAIDE
(Counsel of Record)
WAIDE & ASSOCIATES, P.A.
Attorneys at Law
Post Office Box 1357
Tupelo, Mississippi 38802
Telephone: (662) 842-7324
Facsimile: (662) 842-8056

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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PETITIONER'S REPLY TO RESPONDENT'S "STATEMENT OF FACTS"

Respondent cites *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000), but has no intention of following it. Its "Statement of the Case" contains three pages of facts, all in violation of *Reeves*, since only facts favoring the movant are cited and facts favoring the non-movant are ignored. Indeed, Respondent moved one step beyond ignoring *Reeves*, since it claims the existence of facts contrary to the uncontradicted facts. The very first sentence under Respondent's "Statement of the Case" references "Northwest Airlines' decision not to make Susan Ludwig a pilot . . . ".

But the uncontradicted fact is that Susan Ludwig already is a pilot, holding an Airline Transport Pilot's license, the "final step and the ultimate commercial flying license",[1] and also holds a flight engineer turbo jet rating. App. A; Exhibits "F" and "Y". Since Petitioner was the only candidate holding both the airline transport pilot's license, and the flight engineer rating, her objective qualifications surpassed that of every single male candidate. Respondent was able to disqualify her only by adding a new subjective qualification ("background") after female candidates, including Petitioner, passed the Respondent's objective "pilot personality" tests, at a far higher rate than did the male applicants, Emeott depo., pp. 24-25.

If Respondent intended to pay any attention to *Reeves*, it would have never stated that the fact that at least two of the many males who failed the simulator test

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[1] Cronin, John, *Your Flight Questions Answered: By a Jetliner Pilot*, Plymouth Press: Vergennes, VT, 2000.

in 1994, but then went on to pass the simulator test in 1995 "was immaterial", Respondent's Brief in Opposition, p. 13.[2] Respondent had just argued, at length, that since Ludwig had "washed out of the 1994 class" it was good enough grounds to reject Ludwig in 1995.[3]

The fact that Respondent, like the courts below, is unwilling to follow *Reeves* by stating the facts favoring the non-movant is a good enough reason why this Court should exercise its supervisory powers to reverse this case so as to demonstrate that this Court's precedents must be followed.

REPLY ARGUMENT I.

THE CIRCUITS ARE IN CONFLICT AS TO WHETHER AN EEOC DETERMINATION OF REASONABLE CAUSE CREATES AN ISSUE OF FACT, AND THIS ARGUMENT WAS NOT "WAIVED" BY FAILURE TO RAISE IT BELOW.

Hoping to avoid the question of whether it is appropriate to grant summary judgment for an employer when the EEOC has found the employer had "willfully and with reckless disregard for the requirements of law, discriminated against the charging party as alleged . . . ",

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[2] Although at least thirty (30%) percent of Northwest's internal applicants failed the 1994 flight test given in a DC9 simulator, only two out of thirty-two internal applicants (6%) failed the flight test in 1995 given in a 747 simulator (EEOC Exhibit CC; Emeott affidavit).

[3] In 1995, even though Ludwig passed the written objective pilot tests for Northwest that many males had failed, she was not allowed to proceed to the flight simulator test and final panel interview.

App. 34, Respondent urges that Petitioner "failed to argue the significance of the EEOC finding below". In fact, Respondent's petition for rehearing brought the Appeals Court's attention to Petitioner's "reasonable cause determination", and cited *Gifford v. Atchison, Topeka and Santa Fe Ry. Co.*, 685 F.2d 1149 (9th Cir. 1982), for its holding that a "reasonable cause determination from the EEOC creates an issue of fact". Petition for Rehearing and Rehearing en banc, p. 6.[4]

Contrary to Respondent's Brief in Opposition, p. 9, Petitioner does not contend "EEOC Determinations should be given res judicata effect". Rather, Petitioner's argument is that such determinations are sufficient to avoid summary judgment absent a demonstration that the EEOC's fact-finding is unreliable. Justice Blackmun noted in *Kremer v. Chemical Const. Corp.*, 456 U.S. 461 (1982) that Plaintiff must "present more proof to establish probable cause than to survive summary judgment in federal court". Respondent is correct that Justice Blackmun was referring to a *state* administrative probable cause determination, not an EEOC determination. However, this does not refute the point that an administrative agency's finding of probable cause of discrimination necessarily represents a determination that there is, at least, "an issue of material fact" as to whether discrimination exists.

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[4] Of the nine internal female applicants who applied for pilot promotions at Northwest Airlines in 1995, four of the females filed EEOC charges and federal lawsuits against Northwest Airlines for gender discrimination, some in combination with retaliation and/or wrongful termination charges.

Both *Kremer v. Chemical Const. Co.*, 456 U.S. 461 (1982) and *University of Tennessee v. Elliott*, 478 U.S. 788 (1986), demonstrate the deference which federal judges must pay to the administrative findings of governmental agencies established by the legislative body to investigate employment discrimination. Furthermore, *Chandler v. Roudebush*, 425 U.S. 840, n.11 (1976) states that "prior administrative findings with respect to an employment discrimination claim may, of course, be admitted as evidence at a federal-sector trial de novo . . . ". To disregard an EEOC determination, without any finding of a reason to question the reliability or expertise of the investigative agency, cannot be reconciled with the trust Congress placed in the Equal Employment Opportunity Commission when it gave it the authority to investigate claims of discrimination.[5]

Respondent argues that the "apparent circuit court conflict over what deference is to be given EEOC factual determinations is not a 'meaningful circuit conflict' ". Respondent's Brief in Opposition, p. 8. It claims that the differences between the circuits is simply over the issue of whether all EEOC reports are "per se" admissible, or whether admissibility is determined by the "sound discretion of the trial court". *Id.* According to Respondent, the conflict is an "academic" difference, Respondent's Brief in Opposition, p. 9.

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[5] The EEOC investigator gave weight to the Respondent's use of subjective qualifications ("background") to disqualify Petitioner. The experience of the EEOC in dealing with employers who use subjective criteria to cover for discrimination should have been given deference by the district judge.

In fact, the conflict is outcome determinative. A rule of "per se" admissibility means the EEOC determination has probative value and dictates denial of a summary judgment motion. If the district court were applying the alternative rule that EEOC determinations are admissible "in the sound discretion of the trial court", it should have provided guidance on what is a "sound discretion". To ignore an EEOC fact-finding made by a trained investigator who makes his determination after noting the use of subjective criteria to disqualify an otherwise outstanding candidate is not a "sound discretion".

Besides the fact that the circuits are in conflict over the weight, if any, to be given EEOC findings, the view of the lower courts below cannot be reconciled with *University of Tennessee v. Elliott*, 478 U.S. 788 (1986) and *Kremer v. Chemical Const. Corp.*, 456 U.S. 451 (1982). Both cases mandate that weight must be given to decisions of state administrative agencies in investigating discrimination. Indeed, *Elliott* holds state administrative findings are not due res judicata effect only because of the deference Congress intended to be given to the administrative procedures and investigative ability of the EEOC. *Elliott* and *Kremer* both dictate deference be afforded administrative agencies' discrimination determinations. To give findings of such agencies *no* weight, contravenes these cases.

REPLY ARGUMENT II.

THE COURT OF APPEALS DID NOT "CONSIDER AND REJECT" LUDWIG'S *REEVES V. SANDERSON PLUMBING PRODUCTS, INC.* ARGUMENT.

Respondent claims that the Court of Appeals "considered and rejected Petitioner's *Reeves v. Sanderson Plumbing Products, Inc.* argument." Respondent's brief, p. iii.

This is impossible, since the Court of Appeals affirmed based solely on a district court opinion decided before *Reeves*. The district court could not have "considered and rejected" a case that had not yet been decided.

Unfortunately, Respondent's argument reflects a common theme among the lower courts. Several commentators have noted the lower courts either do not understand or do not apply *Reeves*, and call for further review by this Court. Ryan Vantrease, 39 Brandeis L.J. 747, *The Aftermath of St. Mary's Honor Society v. Hicks and Reeves v. Sanderson Plumbing Products, Inc., A call for clarification*, p. 747 (Spring 2001), concludes:

> No matter what test, framework, interpretation, or analysis that results from *Hicks* and *Reeves*, one thing is clear, a call for clarification is in order. It is both appropriate and necessary for the Supreme Court to review and revise its holding in *Hicks* and *Reeves* in order to hand down a steady, clear and workable framework so that the circuits may be consistent in their analysis of employment discrimination lawsuits.

Anne Lawton, 85 Minn. L. Rev. 587, December, 2000, pp. 628-629, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity* finds:

> Increasingly however, the federal courts are usurping the role of the jury by making fact determinations on summary judgment under the guise of determining whether the Plaintiff has made out a legally sufficient claim of employment discrimination.[6]

The Southern Methodist Law Review, 54 SMU L. Rev. ___ (2001), is publishing a special issue in the Fall of 2001 devoted entirely to the vanishing right to trial by jury in America.[7] Professor William V. Dorsaneo, III, 54 SMU L. Rev. ___, *Re-examining the Right to Trial by Jury*, argues regarding the misinterpretations of *Reeves*:

> [T]he Supreme Court's clear statement that the standard for granting summary judgment "mirrors" the standard for judgment as a matter of law in jury-tried cases requires a reconsideration of the Supreme Court's most important summary judgment opinions and a re-analysis of federal summary judgment practice.

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[6] The Review found employers had obtained summary judgment 197 of 258 (76%) of the cases in its survey.

[7] See also *Echoes of the Founding: The Jury in Civil Cases as Conferrer of Legitimacy* and *Juries: On the Verge of Extinction?* in 54 SMU L. Rev. ___ 2001. The Dallas Morning News series *JURIES ON TRIAL, Right to Trial fades under Court rulings*, and *PowerShift: Laws are snatching authority from jurors and transferring it to the hands of Judges* both May 7, 2000; New York Times March 2, 2001, *Juries, Their Powers Under Siege, Find Their Role is Being Eroded* states that "scholars argue that appeals judges are now substituting their own opinions for those of jurors."

REPLY ARGUMENT III.

THE COURT SHOULD ACCEPT THIS CASE TO DETERMINE WHETHER SUMMARY JUDGMENT PROCEDURES UNDER FED.R.CIV.P. 56 ARE MODIFIED BY THE STATUTORY DUTY OF AIRLINES TO ASSURE SAFETY.

To justify its position that it was entitled to reject Petitioner based upon subjective considerations,[8]

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[8] There was an issue of material fact as to whether Petitioner's subjective qualifications could possibly have been lower than those of the male applicants. See, for example, October 25, 1995 letter written by Hector Adler, Vice President of Inflight Services (flight attendant department), to Marie Emeott, head of Human Resources for pilot hiring. Vice President Adler described Ludwig, at the time of her pilot application, as a "dedicated, conscientious employee". App. B.

Additionally, Petitioner's EEOC probable cause determination states Ludwig "was more qualified or as qualified in the areas of attendance and job performance as the successful male candidates". See also, employment records of successful 1995 male flight candidates such as Charles Skalbeck, a male attendant with numerous personal leaves and disciplinary suspensions from Northwest and the criminal conviction of Norman Prouse once fired from Northwest but rehired as a ground instructor in late 1993, then promoted to pilot again in 1995. Prouse received a felony conviction and prison sentence for flying a Northwest Airliner while intoxicated with passengers aboard against the warning of an FAA inspector. (*United States v. Prouse*, 945 F.2d 1107 (8th Cir. 1991). Respondent cannot reconcile the "backgrounds" of these and other successful male candidates with its concern for "airline safety". According to *Reeves*, differing treatment of older and younger employees is indicative of employment discrimination. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. at 2112 (2000).

Respondent cites "an airline's special obligations to provide the highest possible degree of care". 49 U.S.C. App. § 421b.

But the fact that Congress has provided that airlines must exercise the "highest possible degree of care" begs the question of whether a judge, or a jury, should determine whether safety considerations, or unlawful discrimination, is the reason for hiring decisions.

The finding of the district court, citing *Murname v. American Airlines, Inc.*, 667 F.2d 90 (D.C. Cir. 1988) that a special degree of discretion must be granted to employers in hiring pilots, does not modify the respective roles of judge and jury under Fed.R.Civ.P. 56.[9] Granting summary judgment because of judicial concern about airline safety is "recasting fact questions as law questions, . . . an obvious subterfuge." William Dorsaneo, III, *Re-examining the Right to Trial by Jury*, 54 SMU L. Rev. ___ (2001). See Charles Alan Wright, *The Doubtful Omniscience of Appellate Courts*, 41 Minn. L. Rev. 751, 761 (1957).

CONCLUSION

This case involves a conflict within the circuits over the weight to be given an EEOC determination of discrimination; the burden of proof required to survive summary judgment in light of *Reeves*; and whether an airline's

[9] A study that ranked 409 companies according to corporate fairness to women conducted at the time Petitioner applied for a pilot position at Northwest and published in 1997 concluded Northwest Airlines was one of the five worst "Dead End" corporations for women to work at in America. Ex. L.

discretion in pilot hiring supercedes an individual's right to equal employment opportunity.

Petitioner's case also involves a lower court and an appeals court decision that are wrong in light of *University of Tennessee v. Elliott*, *Kremer v. Chemical Const. Corp.*, and *Chandler v. Roudebush*, regarding the weight of an EEOC determination, decisions that are wrong in evaluating the circumstantial evidence necessary to survive summary judgment in light of *Reeves*.

The general importance of this case is evidenced by the current concern over the vanishing right to trial by jury due to summary judgment; the importance of the circuit's acknowledgment of and adherence to the spirit of the *Reeves'* decision in discrimination cases; and the importance of removing the guise of concerns about airline safety from an industry that continues to hold its percentage of female pilots to single digit figures with the help of Northwest Airlines, a corporation that continues to discriminate against women with seeming impunity.[10] Review by this Court is warranted.

Respectfully submitted,

JIM WAIDE
(*Counsel of Record*)
WAIDE & ASSOCIATES, P.A.
Attorneys at Law
Post Office Box 1357
Tupelo, Mississippi 38802
Telephone: (662) 842-7324
Facsimile: (662) 842-8056

Counsel for Petitioner

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[10] In 1996, Northwest's percentage of females hired as pilots increased to 9.3%, only to fall back to 5.3% (below industry average) again in 1997.

[LOGO] **NORTHWEST AIRLINES**

Hector E. Adler
Vice President
Inflight Services

Northwest Airlines, Inc.
Department A5700
5101 Northwest Drive
St. Paul MN 55111-3034

612 726-3415
612 726-2488 Fax

October 25, 1995

Marie Emeott
Manager-Human Resources
Flight Operations

Re: Susan Ludwig – Pilot applicant

Dear Marie:

Ms. Susan Ludwig is a Northwest flight attendant who is pursuing career opportunities in Flight Operations as a pilot. During her 27 year tenure, Ms. Ludwig has proved to be a dedicated, conscientious employee, who is committed to providing professional service to our customers.

Please contact me if you have any questions.

Sincerely,

/s/ Hector E. Adler
Hector E. Adler

HEA:dgw

JANUARY 30, 1997

TO WHOM IT MAY CONCERN,

MY NAME IS JOHN J. RYAN, A PILOT WITH NORTHWEST AIRLINES SINCE MAY, 1983, THIS LETTER IS IN REGARDS TO DTW FLIGHT ATTENDANT, SUE LUDWIG. I HAVE KNOWN SUE SINCE MY FIRST GROUND SCHOOL WITH HER FOR FLIGHT ENGINEER ON THE B-727 IN 1983.

MY RECOLECTION [sic] OF MS. LUDWIG IN THIS GROUND SCHOOL IS THAT SHE WAS AN EXCELLENT STUDENT AND HAD NO DIFFICULTY WITH THE B-727 SYSTEMS OR GROUND SCHOOL.

I FEEL THAT SUE LUDWIG IS A DEDICATED NORTHWEST EMPLOYEE AND WOULD CONTINUE TO BE AN ASSET AS A NORTHWEST PILOT.

SINCERLY [sic],

/s/ John J. Ryan
JOHN J. RYAN

CC: S. LUDWIG

10/16/74
108678

LUDWIG
SUSAN

I. UNITED STATES OF AMERICA
Department of Transportation – FEDERAL AVIATION ADMINISTRATION

THIS CERTIFIES IV. SUSAN LOUISE LUDWIG
THAT V. 6213 PRESIDENTIAL LANE
SACRAMENTO CA 9582[illegible]

DATE OF BIRTH	HEIGHT	WEIGHT	HAIR	EYES	SEX	NATIONALITY VI.
10-02-52	62 in.	105	BLOND	BLUE	F	USA

IX. HAS BEEN FOUND TO BE PROPERLY QUALIFIED TO EXERCISE THE PRIVILEGES OF
II. FLIGHT ENGINEER III. CERT. NO. 58984[illegible]
RATINGS AND LIMITATIONS
XII. TURBOJET POWERED

XIII.

VII. Sue Ludwig SIGNATURE OF HOLDER X.
X. DATE OF ISSUE: 07-06-83 VIII. ADMINISTRATOR
AC Form 8060-1 (5-81)

I. UNITED STATES OF AMERICA
Department of Transportation – FEDERAL AVIATION ADMINISTRATION

THIS CERTIFIES IV. SUSAN LOUISE LUDWIG
THAT V. 6213 PRESIDENTIAL LANE
SACRAMENTO CA 9582[illegible]

DATE OF BIRTH	HEIGHT	WEIGHT	HAIR	EYES	SEX	NATIONALITY VI.
10-02-52	62 in.	105	BLOND	BLUE	F	USA

IX. HAS BEEN FOUND TO BE PROPERLY QUALIFIED TO EXERCISE THE PRIVILEGES OF
II. AIRLINE TRANSPORT PILOT III. CERT. NO. 58984[illegible]
RATINGS AND LIMITATIONS
XII. AIRPLANE MULTIENGINE LAND
COMMERCIAL PRIVILEGES
AIRPLANE SINGLE ENGINE LAND

XIII.

VII. Sue Ludwig SIGNATURE OF HOLDER X.
X. DATE OF ISSUE: 07-12-88 VIII. ADMINISTRATOR
AC Form 8060-1 (5-81)

UNITED STATES OF AMERICA
Department of Transportation
Federal Aviation Administration
MEDICAL CERTIFICATE First CLASS

This certifies that (*Full name and address*):
Susan Louise Ludwig
6213 Presidential Lane
Sacramento, CA 95828

Date of Birth	Ht.	Wt.	Hair	Eyes	Sex
10-2-52	62	109	Bld	Blu	F

has met the medical standards prescribed in Part 67, Federal Aviation Regulations, for this class of Medical Certificate.

Limitations: None

Date of Examination: 09-14-95
Examiner's Serial No.: ATR 16385-1
Examiner Signature: Peter J Ferrino
Typed Name: Peter J Ferrino M.D.
AIRMAN'S SIGNATURE: Sue Ludwig

FAA Form 8500-9 (7-82) Supersedes Previous Edition

DMV

EXPIRES ON BIRTHDAY
1 9 8[illegible]

DRIVER LICENSE
C4708626
Susan Louise Ludwig
6213 Presidentail Lane
Sacramento, Ca 95828

F Brn Grn 5-2-109 10-02-52

Sue Ludwig
7-84 33 30

CERTIFICATE OF RENEWAL

Issued to

SUSAN LOUISE LUDWIG
62B PRESIDENTIAL LN
SACRAMENTO, CA 95828

Sue Ludwig
SIGNATURE

Valid only if signed and carried with Driver License Number C4708626

Fee PAID

Expires on Birthday in 1995

DL 4A (REV. 9[illegible]) HQ LB:PR

Frank Zolin
FRANK S. ZOLIN, Director

UNITED STATES OF AMERICA
Federal Communications Commission
Restricted Radiotelephone Operator Permit

Susan Louise Ludwig

is authorized to operate any radio station which may be operated by a person holding this class of license. This permit is issued in conformity with Paragraphs 3454 and 3945 of the Radio Regulations, Geneva 1979, and is valid for the lifetime of the holder unless suspended by the FCC.

Not valid without FCC Seal

Sue Ludwig

App. 3

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